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C O N F I D E N T I A L SECTION 01 OF 03 BOGOTA 004328

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E.O. 12958: DECL: 04/28/2014

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SUBJECT: ANDEAN FTA ANALYSIS: INTELLECTUAL PROPERTY RIGHTS
IN COLOMBIA

Classified By: DCM Milton Drucker for reasons 1.5 (b and d)

11. (C) SUMMARY: Intellectual property rights (IPR) in Colombia are largely governed by Andean Community decisions, which are interpreted by GOC law. The latter complies with the WTO, though in key areas Colombian protection is weaker than TRIPS protections. Enforcement of IPR law is the principle problem. Though enforcement actions have redoubled in the past year, prosecution is weak and judicial action, often by judges unfamiliar with IPR, can take years. This hampers the use of civil actions by right holders. For the FTA talks, GOC will be concerned with protection of genetic material and traditional knowledge. They can be expected to ask for more time for compliance and U.S. technical assistance to meet IPR protection standards. This is the second in a series of sector briefs developed in preparation for the Andean FTA. The summaries are based on in-depth studies which are available from USAID Bogota. END SUMMARY.

Background

12. (U) Protection of intellectual property continues to improve in Colombia. Colombia is the only Andean nation to have established strong data secrecy protections for both pharmaceuticals and agrochemicals (although agrochemical protections were later weakened). Colombian legislation also provides penalties for IP infringement. But while the laws are on the books, and enforcement actions are increasing, prosecution remains a problem. The Uribe Administration and industry groups have demonstrated commitment to increase the level of protection, but are hampered by fiscal constraints and the poor performance of the judicial system. Post has recommended that Colombia appear again on the Special 301 Watch List this year.

13. (U) Colombia lacks a unified IPR registration system. The Superintendent of Industry and Commerce (SIC) acts as the Colombian patent and trademark office. The agency suffers from a backlog of trademark and patent applications, but plans to provide electronic registration services for patents, industrial designs, and trademarks are expected to boost registrations. The Colombian Agricultural Institute (ICA) is in charge of the issuance of plant variety protection-related and agro-chemical patents. The Ministry of Social Protection is in charge of issuance of pharmaceutical patents, while the Ministry of Justice issues literary copyrights. Each organization suffers from significant financial and technical resource constraints. The GOC recognizes that information technology (IT) capital investment and technology transfer stimulate economic growth, and is beginning to see IPR protection as a vital concern.

GOC Problems in Enforcement of Existing Agreements

14. (U) Despite having signed some seven international agreements, Colombia has yet to successfully grapple with rampant piracy and copyright infringement, especially in recorded media. Copyright infringement cost U.S. industries some \$123 million in 2002, according to the International Intellectual Property Alliance (IIPA). Music piracy is at 70 percent and films at 75 percent. Although GOC doubled police raids to 2,467 in 2003, few of those caught were prosecuted, and the only two convictions are on appeal. Jail time can be avoided under the current penal law. Successes have been scored in business software piracy, now down from 78 to 51 percent thanks to software industry efforts and the GOC's decision to use legal software despite fiscal constraints. Problems in the cable industry have abated with the licensing of illegal operators following aggressive legal action by industry groups and regulatory inspections.

Intellectual Property Issues for Negotiation in an FTA

15. (U) The Andean Common External Tariff applies rates of 15 percent to 20 percent to imported hardware and software bound for domestic consumption. These are reduced to an average of 5 percent when treated under "Plan Vallejo," which provides tax exemptions on imported capital goods used to produce export products.

¶6. (U) Protection of Business Software and Computer Designs. Semiconductor layout designs are not protected under GOC law. While business software is protected for 50 years, it is not explicitly classified as a literary work.

¶7. (U) Data Secrecy Protection for Pharmaceuticals and Agrochemicals for up to five years was provided for pharmaceuticals and agrochemicals in March, 2003 (though agrochemicals have 10 years under the Chile FTA and CAFTA). However, the subsequent passage of laws in 2003 significantly weakened agrochemical protections by restricting them to those not previously registered in Colombia. Moreover, while the GOC agrees that TRIPS requires an exclusivity period, politically influential companies argue TRIPS only protects against pharmaceuticals using data that is not publicly available. A recent decision by the Andean Community Secretary General upheld Decree 2085 that granted the 5 year

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protection period for data secrets for pharmaceuticals.

8.(U) Patent Protection for "Second Use Innovations" has been denied by the Andean Court of Justice (ACJ) and the SIC. The pharmaceutical industry dedicates much research to identifying second uses of known chemical substances to meet medical needs. The SIC argues that Andean decisions mention protection of products and procedures but not use, adding that "use" is also not covered in TRIPS. This is contrary to the position on secondary use protections. The WTO has reached no clear consensus on second uses.

¶9. (SBU) Biotechnology Innovations and Plant Varieties. GOC argues that microorganisms as found in nature are discoveries rather than innovations, and thus excluded from patent protection, except those that are genetically modified. Colombia allows patents for plant varieties, but not for plants and animals found in nature. U.S. firms argue that this severely discourages biotech research and innovation.

¶10. (C) Access to Genetic Resources is an issue GOC the would like specifically addressed in an FTA. They argue that to provide patent protection for innovations developed from genetic resources, it must be demonstrated that the resources were obtained legally. TRIPS does not specifically address this area, and the WTO has yet to develop clear guidelines regarding rules of origin for genetic resources.

¶11. (C) Patent Protection for Traditional Knowledge and clarification of who should be entitled to it (indigenous or other communities) needs greater definition. Colombia may seek a "sui-generis" protection regime in this area. However, developing a transparent and objective set of rules on incorporating community participation in patenting traditional knowledge would be extremely challenging in practice.

¶12. (C) Getting to the Table: What GOC Needs to Do

¶A. GOC needs to improve IPR enforcement and to remedy weaknesses in the prosecution of cases, a critical area for trade capacity building. Civil and penal judges rule in IPR violation cases, but they lack training and specialization in IPR issues. Although the Prosecutor General's Office has created a Specialized Unit for IPR that has had significant recent successes, more training of judges and investigators is needed. The GOC should consider shifting from judicial to administrative IPR enforcement to speed adjudication of the current case backlog.

¶B. GOC is considering a penal bill to increase penalties for violations of copyright and pirated use of plant varieties. Such a law would advance the FTA.

¶C. The National Planning Department (DNP) has suggested merging all GOC institutions that manage IPR issues (patents, industrial designs, trademarks, copyrights, etc.) into a single institution with full power. Such a Colombian "Patent Office" has been promoted by industry groups and would represent a significant step forward as well as an important area for trade capacity building.

¶D. Access to technology and information for enforcement purposes needs to be upgraded, and outreach on the IPR rights of the business community is needed.

¶E. The DNP has suggested establishment of a Superior Council on Intellectual Property Rights (to include the President and relevant Ministries) and an IPR section in the Ministry of Trade that would help set policy on IP issues. Such steps could facilitate preparation for effective implementation of an FTA.

¶13. (C) GOC Positions on Intellectual Property Protection

¶A. GOC wishes to liberalize trade in intellectual property as the best means to transfer technology.

1B. GOC would like to specifically address protection of genetic material and traditional knowledge in an FTA. Access to genetic material was not addressed in the Chile FTA.

1C. GOC would like more technical assistance to help in enforcement and judicial prosecution of IPR cases.

14. (C) GOC Negotiating Strategy for Intellectual Property Protection

1A. GOC will point to recent enforcement results to demonstrate improvement in the IPR environment.

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